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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN TACOMA

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CHAO CHEN,	)	
	)	
Plaintiff,	)	No. CV17-5769RJB
	)	
v.	)	
	)	
THE GEO GROUP,	)	
	)	
Defendant.	)	
	)	
and	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE GEO GROUP, INC.,	)	
	)	
Defendants.	)	

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MOTION HEARING

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August 2, 2018

BEFORE THE HONORABLE ROBERT J. BRYAN  
UNITED STATES DISTRICT COURT JUDGE

1       **APPEARANCES:**

2       **For the Plaintiff:**

3               **Andrew Free**

4               **LAW OFFICE OF R. ANDREW FREE**

5               **Adam J Berger**

6               **Jamal Whitehead**

7               **SCHROETER GOLDMARK & BENDER**

8       **For the Defendants:**

9               **Mark Emery**

10              **NORTON ROSE FULBRIGHT**

11              **Joan Mell**

12              **III BRANCHES LAW**

09:28:53AM 1 MS. MELL: Good morning, your Honor.

09:28:56AM 2 THE COURT: This is further in Nwauzor versus  
09:29:04AM 3 GEO, No. 17-5769, and comes on for oral argument on three  
09:29:09AM 4 pending motions.

09:29:14AM 5 Ms. Mell and Mr. Emery are here for the defendants.  
09:29:18AM 6 Let's see, Mr. Free, Mr. Whitehead, and Mr. Berger are  
09:29:26AM 7 here for plaintiffs.

09:29:28AM 8 A couple of housekeeping matters first. Mr. Chen was  
09:29:40AM 9 dismissed as a plaintiff in the case. He is still on the  
09:29:45AM 10 record as a defendant in the counterclaim. Is that  
09:29:54AM 11 intentional or should he be dismissed from the case?

09:29:59AM 12 MS. MELL: Your Honor, GEO's position --

09:30:02AM 13 THE COURT: Wait a minute. You need to speak  
09:30:04AM 14 right into the mic.

09:30:06AM 15 MS. MELL: GEO's position is that Mr. Chen should  
09:30:10AM 16 remain as a counterdefendant.

09:30:13AM 17 THE COURT: Okay. That's not the subject of  
09:30:20AM 18 today's issues, I just wanted to raise the issue because  
09:30:25AM 19 it wasn't clear to staff.

09:30:27AM 20 There have been a couple of late matters filed,  
09:30:41AM 21 including a letter from ICE, and then the other one a  
09:30:49AM 22 declaration from a Tae Johnson, the last being filed just  
09:31:00AM 23 this morning. Have those things been served on counsel?  
09:31:07AM 24 Do you have those?

09:31:11AM 25 MR. FREE: We do, your Honor.

09:31:14AM 1 THE COURT: I have read -- I had the week off  
09:31:20AM 2 last week, almost. I spent part of that week sitting on a  
09:31:26AM 3 deck out on Hood Canal reading stuff, including everything  
09:31:34AM 4 filed on these three motions. And then I have reviewed  
09:31:43AM 5 since then a good deal of what is in the files. That's a  
09:31:50AM 6 lot of reading. This case is way too paper heavy at this  
09:32:03AM 7 point.

09:32:05AM 8 Be that as it may, I have read a lot. We have  
09:32:10AM 9 discussed it and worked on it in chambers, as well. I set  
09:32:16AM 10 this oral argument to give you the opportunity to tell me  
09:32:21AM 11 whatever you think is appropriate to say or to argue on  
09:32:29AM 12 the issues raised by these three motions. I would ask  
09:32:35AM 13 that you limit your comments to 20 minutes a side.

09:32:47AM 14 In the order of filing, the plaintiffs' motions are  
09:32:55AM 15 older than the defendants' motion for class certification,  
09:33:01AM 16 so I assume you go first.

09:33:23AM 17 MR. WHITEHEAD: Yes, your Honor. I am sorry.  
09:33:26AM 18 I'm unclear as to the order.

09:33:29AM 19 THE COURT: You need to speak into the mic. You  
09:33:32AM 20 will break your back if you lean over. Just remain seated  
09:33:36AM 21 and tell me what's on your mind.

09:33:38AM 22 MR. WHITEHEAD: I just want to make sure that I  
09:33:39AM 23 am clear as to the order. Are you asking for plaintiffs  
09:33:42AM 24 to argue their class certification motion?

09:33:44AM 25 THE COURT: They made the motion first. They can

09:33:49AM 1 argue -- They're all three motions. Anybody can argue  
09:33:56AM 2 within the time limits whatever you want to argue about  
09:33:58AM 3 those three motions. I am mindful that plaintiffs' motion  
09:34:05AM 4 and the defendants' motion regarding class certification  
09:34:09AM 5 are on the same subject.

09:34:11AM 6 MR. WHITEHEAD: Then, your Honor, we will go  
09:34:13AM 7 first.

09:34:14AM 8 MS. MELL: No. He said --

09:34:15AM 9 THE COURT: You won't go first, because they  
09:34:18AM 10 filed first, the motion to deny class certification.

09:34:23AM 11 MR. WHITEHEAD: All right. Thank you, your  
09:34:25AM 12 Honor.

09:34:26AM 13 MR. EMERY: Good morning, your Honor. My name is  
09:34:29AM 14 Mark Emery of the GEO Group. I would ask if the court  
09:34:37AM 15 would reserve five minutes for rebuttal.

09:34:39AM 16 THE COURT: The time is yours. Keep track of it  
09:34:41AM 17 yourself.

09:34:42AM 18 MR. EMERY: Your Honor, this is the first  
09:34:44AM 19 opportunity I have had to speak with you on these cases.  
09:34:47AM 20 I am counsel for the GEO Group in all of the detainee work  
09:34:53AM 21 cases that are currently pending right now, in Colorado,  
09:34:56AM 22 both the cases before your Honor, and in California, as  
09:34:58AM 23 well. So I am very aware of the importance of the issues  
09:35:01AM 24 that are sitting before the court today, and the fact that  
09:35:04AM 25 we put a lot of paper in front of you.

09:35:07AM 1           The issues I would like to cover are, first of all,  
09:35:13AM 2           the immunity issue, Yearsley immunity. I will probably  
09:35:18AM 3           spend most of my time on that.

09:35:20AM 4           I would like to say a few things further about the  
09:35:23AM 5           issue of employment, the nature of the employment in  
09:35:24AM 6           question. I will say I have reviewed the past hearing  
09:35:29AM 7           transcripts and read very carefully your Honor's questions  
09:35:32AM 8           that you put forward.

09:35:33AM 9           And I also recognize the importance of the class  
09:35:35AM 10          certification issue, because you are the first court to  
09:35:38AM 11          consider whether a minimum wage claim would be certified  
09:35:41AM 12          for a class. The Menocal case is older, but that, in  
09:35:47AM 13          fact, was dismissed in that case.

09:35:47AM 14          To begin with the Yearsley immunity: The federal  
09:35:54AM 15          government delegates authority to contractors to carry out  
09:35:57AM 16          a number of its different missions, including federal  
09:36:01AM 17          immigration detention. The Yearsley doctrine provides  
09:36:07AM 18          that when the government authorizes a contractor to take  
09:36:11AM 19          certain actions, it directs the contractor, and that  
09:36:14AM 20          authorization is valid, the contractor is entitled to  
09:36:20AM 21          immunity.

09:36:21AM 22          What we are talking about here is the Voluntary Work  
09:36:24AM 23          Program. What is distinctive about this case is that the  
09:36:29AM 24          only claim is a minimum wage claim. The plaintiffs are  
09:36:34AM 25          essentially alleging that we are liable under the

09:36:39AM 1 Washington Minimum Wage Act for doing exactly what the  
09:36:43AM 2 government has told us to do.

09:36:45AM 3 Now, I want to get into the details of that  
09:36:48AM 4 authorization and try to make it as clear to you as I can  
09:36:53AM 5 why we think we have that authorization and are cloaked in  
09:36:58AM 6 immunity.

09:36:58AM 7 One sort of very preliminary remark: When you read  
09:37:01AM 8 the nature of the pleadings in this case and the  
09:37:03AM 9 arguments, the plaintiffs have gone forward as if they are  
09:37:07AM 10 sort of exposing some deep secret that GEO has at the  
09:37:13AM 11 Northwest Detention Center, in the way it runs its  
09:37:17AM 12 program, the truth could not be further apart.

09:37:20AM 13 What we do is straight up according to the policies  
09:37:26AM 14 that ICE put forward in the terms of our contract. We  
09:37:29AM 15 operate the Voluntary Work Program in broad daylight. I  
09:37:36AM 16 would like to begin with a brief discussion of those  
09:37:38AM 17 standards.

09:37:39AM 18 If you don't mind, I will put a couple of things up.  
09:37:42AM 19 These are all materials that are in the record. So we  
09:37:50AM 20 begin with Section 5.8 of the Voluntary Work Program.  
09:37:54AM 21 This is from ICE's national standards.

09:37:56AM 22 The first thing I would point to here is No. 1, where  
09:37:59AM 23 it outlines three different kinds of facilities. ICE  
09:38:02AM 24 operates three different kinds of facilities: An SPC,  
09:38:06AM 25 which ICE runs directly, and two different kinds of

09:38:09AM 1 contract facilities, CDFs and IGSA. The one that is at  
09:38:13AM 2 issue is a CDF. The same policies apply at all of these  
09:38:19AM 3 different facilities.

09:38:20AM 4 Second, if you look down at 5.8(1)(b) here, you see  
09:38:24AM 5 that this is listed as an expected outcome. Number one,  
09:38:30AM 6 "Detainees may have opportunities to work," and so on, as  
09:38:37AM 7 described here, within the constraints of what we are  
09:38:39AM 8 doing at a detention facility.

09:38:42AM 9 Flipping over to Section 5(a), again, this is  
09:38:47AM 10 mandatory language, "Detainees shall be provided the  
09:38:51AM 11 opportunity to participate in a Voluntary Work Program."

09:38:57AM 12 Now we move to the relevant portions of the contract.  
09:39:07AM 13 This is from Page 82 of the contract. We see that one of  
09:39:12AM 14 the directives that ICE gives to GEO is to manage --

09:39:16AM 15 THE COURT: Can you erase those arrows that are  
09:39:19AM 16 not --

09:39:22AM 17 MR. EMERY: How do I do that? That is  
09:39:26AM 18 distracting. Thank you.

09:39:27AM 19 And I thought it might be worthwhile, very quickly,  
09:39:32AM 20 just looking at the particular language of this case. So  
09:39:34AM 21 the first sentence, "Detainee labor shall be used in  
09:39:38AM 22 accordance with the detainee work plan developed by the  
09:39:42AM 23 contractor, and will adhere" --

09:39:43AM 24 THE COURT: Just a minute. You are getting ahead  
09:39:45AM 25 of me here. I don't know where you are looking at,

09:39:49AM 1 Page 82. I have a copy of the contract here. All right.

09:39:58AM 2 MR. EMERY: This is Page 82 of the contract.

09:40:03AM 3 "Detainee labor shall be used in accordance with the  
09:40:06AM 4 detainee work plan developed by the contractor, and in  
09:40:09AM 5 accordance with the ICE PBNDS on the Voluntary Work  
09:40:14AM 6 Program," which we just looked at.

09:40:16AM 7 So we are not hiding anything here. ICE tells us  
09:40:19AM 8 that detainee labor shall be used. It shall be used in  
09:40:23AM 9 accordance with its standards.

09:40:25AM 10 Continuing on, "The detainee work plan must be  
09:40:28AM 11 voluntary, and may include work or program arrangements  
09:40:32AM 12 for industrial, maintenance, custodial, service, or other  
09:40:36AM 13 jobs."

09:40:38AM 14 What I would emphasize there is, we are not just  
09:40:41AM 15 talking about detainees cleaning their cells, we are  
09:40:46AM 16 talking about a wide range of things that ICE has directed  
09:40:49AM 17 us to have detainees do.

09:40:52AM 18 Further, "The detainee work program shall not  
09:40:55AM 19 conflict with other requirements of the contract, and must  
09:40:57AM 20 comply with all applicable laws and regulations."

09:41:02AM 21 We understand that one of the allegations that the  
09:41:06AM 22 plaintiffs make in this case is that this phrase somehow  
09:41:09AM 23 encompasses the minimum wage law -- Minimum Wage Act.  
09:41:18AM 24 This phrase needs to be read in the context of the  
09:41:20AM 25 contract itself. One really need look no further than the

09:41:24AM 1 very next sentence to understand why detainees aren't  
09:41:29AM 2 GEO's employees.

09:41:30AM 3 The next paragraph begins, "Detainees will not be  
09:41:34AM 4 used to perform the responsibilities or duties of an  
09:41:37AM 5 employer" -- "of the contractor." So the contract  
09:41:39AM 6 especially distinguishes between what detainees do, which  
09:41:45AM 7 can be a number of different jobs at the facility, and  
09:41:47AM 8 what employees do.

09:41:48AM 9 So moving on to the pay term, which I know is a key  
09:41:52AM 10 issue that is in dispute here. Going back to the PBNDS,  
09:41:58AM 11 I'm sure you are familiar with the language by now,  
09:42:01AM 12 Subsection K of 5.8 states, "Compensation is at least \$1  
09:42:07AM 13 U.S. per day. The facility shall have an established  
09:42:10AM 14 system that ensures the detainees receive the pay owed  
09:42:14AM 15 them before being transferred or released."

09:42:17AM 16 The authorization that ICE gives us is to pay at  
09:42:19AM 17 least \$1 a day. We pay \$1 a day. This is the exact same  
09:42:25AM 18 rate ICE pays at its own facility. This is the same rate  
09:42:28AM 19 that's paid in all of the facilities, unless there is some  
09:42:32AM 20 other arrangement made.

09:42:33AM 21 You will notice, too, the second sentence here, "The  
09:42:36AM 22 facility shall have an established system that ensures  
09:42:39AM 23 detainees receive the pay owed them before being  
09:42:41AM 24 transferred or released." An important point that I hope  
09:42:45AM 25 has come out in the briefing, and should come out in the

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09:42:47AM 1 declarations filed today, and other declarations we filed,  
09:42:53AM 2 Mr. Kimble's in particular, is that GEO doesn't pay -- GEO  
09:42:59AM 3 doesn't decide what to pay detainees.

09:43:01AM 4 THE COURT: They decided \$1 a day in their  
09:43:06AM 5 worker's handbook.

09:43:07AM 6 MR. EMERY: Your Honor, ICE decides that it's \$1  
09:43:10AM 7 a day, and we administer that.

09:43:13AM 8 THE COURT: Where does ICE say \$1 a day rather  
09:43:19AM 9 than not less than \$1 a day?

09:43:23AM 10 MR. EMERY: We can look to another portion of the  
09:43:25AM 11 contract here. Looking at the highlighted portion, this  
09:43:35AM 12 is included in the same contract, "Detainee wages for the  
09:43:39AM 13 detainee work program, reimbursement for this line item  
09:43:42AM 14 via the actual cost of \$1 per day per detainee.  
09:43:46AM 15 Contractor shall not exceed the amount shown without prior  
09:43:49AM 16 approval by the contracting officer."

09:43:53AM 17 You can see that there are amounts put there. The  
09:43:55AM 18 rate --

09:43:56AM 19 THE COURT: That's what you get reimbursed for.  
09:44:00AM 20 How does that limit the pay?

09:44:03AM 21 MR. EMERY: That's the amount that ICE pays to  
09:44:05AM 22 detainees. GEO's role in the payment --

09:44:10AM 23 THE COURT: You pay more than that in some  
09:44:14AM 24 facilities, I understand.

09:44:17AM 25 MR. EMERY: I will address that in a moment. I

09:44:20AM 1 want to be clear what this provision says, which is that  
09:44:24AM 2 ICE pays \$1 to detainees.

09:44:27AM 3 The term "reimbursement rate" may be a little bit  
09:44:30AM 4 confusing. It is not a matter of ICE deciding to  
09:44:35AM 5 reimburse and GEO being able to pay whatever it wants.  
09:44:39AM 6 There is a rate that is set. There is an amount that can  
09:44:43AM 7 be paid per year. That is the total amount, \$114,975.  
09:44:48AM 8 This is what ICE has said, "GEO, you will pay this in a  
09:44:52AM 9 year." So essentially a dollar a day, 114,000 of them.  
09:44:58AM 10 This is providing 114,900 some daily opportunities --

09:45:03AM 11 THE COURT: What is to prevent you from deciding  
09:45:06AM 12 the rate is going to be \$2 per day?

09:45:08AM 13 MR. EMERY: Per this exact provision, we have to  
09:45:10AM 14 seek ICE's approval on that.

09:45:13AM 15 THE COURT: Why?

09:45:14AM 16 MR. EMERY: Because it says we shall not exceed  
09:45:17AM 17 the amount without the approval of the contracting  
09:45:19AM 18 officer. And there are clear --

09:45:24AM 19 THE COURT: Isn't that relative to reimbursement  
09:45:31AM 20 rather than what you pay detainees?

09:45:40AM 21 MR. EMERY: I really encourage you to not get  
09:45:43AM 22 hung up on the idea of reimbursement. This is ICE paying.  
09:45:46AM 23 GEO does not pay the detainees. ICE pays the detainees.  
09:45:51AM 24 We facilitate the payment.

09:45:52AM 25 THE COURT: I am curious about that. GEO set the

09:46:03AM 1 \$1 a day in the employee handbook. I guess I fail to see  
09:46:19AM 2 why GEO can't pay more if they choose to out of the  
09:46:24AM 3 goodness of their heart.

09:46:27AM 4 MR. EMERY: This is why, your Honor: GEO's  
09:46:30AM 5 handbook notes a dollar a day, but GEO doesn't set that  
09:46:34AM 6 rate. ICE sets that rate. For example, when detainees  
09:46:37AM 7 enter the facility they are given a detainee handbook.  
09:46:40AM 8 That detainee handbook, the one in 2014, when this class  
09:46:44AM 9 action began, said, "Pay will be \$1 per day." That is ICE  
09:46:49AM 10 telling every detainee in every facility, whether run by  
09:46:53AM 11 ICE or run by us, that pay will be \$1 per day. This is  
09:46:56AM 12 the rate that ICE sets.

09:46:58AM 13 As for why GEO wouldn't pay -- couldn't pay more, the  
09:47:02AM 14 contract says we shall not exceed that amount without  
09:47:05AM 15 ICE's approval.

09:47:07AM 16 There are clear reasons why ICE would want that to  
09:47:09AM 17 happen. Your Honor, we are in a long-term contracting  
09:47:14AM 18 relationship with ICE. Every dollar that comes from ICE  
09:47:17AM 19 appropriations to detainees comes from U.S. taxpayers.  
09:47:21AM 20 The government has an interest in knowing what's expended  
09:47:25AM 21 on this. It sets limits on it. It is not going to allow  
09:47:28AM 22 GEO to go pay higher rates.

09:47:31AM 23 Now, you will find in the declaration that was filed  
09:47:34AM 24 this morning --

09:47:35AM 25 THE COURT: Wait a minute. Why would the

09:47:40AM 1 government not allow you to pay a higher rate? They won't  
09:47:44AM 2 reimburse you for a higher rate, but why would they say  
09:47:47AM 3 you can't pay a higher rate?

09:47:50AM 4 MR. EMERY: Look through this contract, the  
09:47:54AM 5 government controls every aspect of what we do at the  
09:47:56AM 6 facility. I mean, look at the line item -- You see the  
09:48:02AM 7 line item here on the top: "Estimating travel costs,  
09:48:07AM 8 including lodging and meals." You will see it has the  
09:48:10AM 9 exact same language in there. You might use the same  
09:48:13AM 10 logic, "Oh, why would the government care how much we  
09:48:16AM 11 spend on lodging and meals?" But that exact same language  
09:48:19AM 12 is in there. The amount that is allocated for it under  
09:48:22AM 13 the contract shall not be exceeded without ICE's approval.  
09:48:28AM 14 ICE wants to control these costs. ICE has an interest in  
09:48:32AM 15 controlling these costs.

09:48:35AM 16 You will see in the declaration that was filed this  
09:48:40AM 17 morning, which comes directly from ICE, in Paragraph 24,  
09:48:46AM 18 explains those provisions, "The NWC contract sets the  
09:48:51AM 19 quantity of \$1 reimbursements at 114,975 per option year.  
09:48:54AM 20 GEO shall not exceed that quantity without prior approval  
09:48:58AM 21 by the contracting officer. This approval can be sought  
09:49:01AM 22 by GEO and would be memorialized through a bilateral  
09:49:05AM 23 contract modification."

09:49:06AM 24 So the rate could be raised. If ICE decides that  
09:49:12AM 25 U.S. taxpayers want to pay \$11 to detainees an hour, it

09:49:16AM 1 will pass through that amount to detainees, we'll make  
09:49:19AM 2 sure they get paid that amount, and we go on. But it is  
09:49:23AM 3 ICE that funds everything that happens at the detention  
09:49:26AM 4 facility. We are a contractor.

09:49:30AM 5 That brings us back to the immunity point. We do all  
09:49:34AM 6 of this within the scope of our authorization. If we  
09:49:37AM 7 started paying a different amount, it actually would be  
09:49:40AM 8 going in a different direction from our authorization. It  
09:49:43AM 9 is in our interest to do what ICE directs us to do, which  
09:49:46AM 10 ultimately is in conformity with what Congress has  
09:49:51AM 11 directed.

09:49:51AM 12 That's the second part of the Yearsley test, whether  
09:49:54AM 13 this authorization to run the VWP at the dollar per day  
09:49:59AM 14 rate is validly authorized.

09:50:01AM 15 We have given you the text of this. The statute  
09:50:04AM 16 bears close care, 1855(d). It is an old statute, but it  
09:50:09AM 17 contains all of the language that is necessary to continue  
09:50:11AM 18 to direct -- or to infallibly confer authority on ICE to  
09:50:17AM 19 have us run the VWP at a dollar per day. It allocates  
09:50:23AM 20 money from here and for after.

09:50:24AM 21 It says Congress may from time to time set a rate,  
09:50:27AM 22 which it has done in different years. It seems to be an  
09:50:31AM 23 item that was sort of stuck in the budget for a long time.  
09:50:34AM 24 It no longer does.

09:50:35AM 25 Again, the declaration from ICE that we filed today,

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09:50:38AM 1 particularly Paragraph 13, explains that Congress set this  
09:50:42AM 2 rate, and that's what their rate continues to be. "Per  
09:50:46AM 3 the terms of the contract, as well as authority provided  
09:50:48AM 4 above, reimbursement for the Voluntary Work Program is \$1  
09:50:53AM 5 per day per detainee."

09:50:54AM 6 The last point I want to make on the Yearsley  
09:51:02AM 7 immunity is, by asking whether GEO can pay more on its  
09:51:10AM 8 own -- this is really missing the point of what's  
09:51:13AM 9 happening here, that this is the administration of a  
09:51:17AM 10 government program. The government sets what terms the  
09:51:21AM 11 U.S. taxpayers will pay for this.

09:51:23AM 12 Paragraph 19 of the declaration filed today says it  
09:51:26AM 13 as clearly as can be said: "NWAC has implemented and  
09:51:31AM 14 conforms to the current PBNDS. PBNDS requires that  
09:51:36AM 15 detainees receive at least \$1 per day for work performed  
09:51:40AM 16 in the VWP." That is exactly what we do. So we act  
09:51:43AM 17 within the government's authorization, and therefore we  
09:51:46AM 18 are entitled to immunity.

09:51:50AM 19 If your Honor has no other questions on immunity, I  
09:51:53AM 20 will move to other issues.

09:51:54AM 21 THE COURT: Okay. Thank you.

09:51:58AM 22 MR. EMERY: A second point --

09:51:59AM 23 THE COURT: If you wanted to save some time --  
09:52:05AM 24 Use your time as you choose, I guess.

09:52:13AM 25 MR. EMERY: As I said, your Honor, I did want to

09:52:21AM 1 touch on some of the broader issues of employment class  
09:52:24AM 2 certification, but I imagine these are things I can  
09:52:28AM 3 address later.

09:52:59AM 4 MR. FREE: Good morning, your Honor. My name is  
09:53:09AM 5 Andrew Free, and I am appearing on behalf of the  
09:53:12AM 6 plaintiffs in this case, along with my co-counsel Jamal  
09:53:15AM 7 Whitehead. And Adam Berger is here with us, as well. I  
09:53:19AM 8 am going to address Yearsley immunity, and Mr. Whitehead  
09:53:23AM 9 will address the class certification questions in this  
09:53:25AM 10 case that are before the court.

09:53:26AM 11 I will pick up with the court's question, which I  
09:53:30AM 12 think is the critical one, and that is the difference  
09:53:34AM 13 between a reimbursement rate that is set by the federal  
09:53:37AM 14 government about how much ICE will pay GEO back for the  
09:53:41AM 15 work that is performed by detained immigrants, and a pay  
09:53:44AM 16 rate, which is what GEO is saying ICE has authorized it to  
09:53:48AM 17 set. So it is the difference between the floor to the  
09:53:51AM 18 ceiling.

09:53:51AM 19 We have Docket No. 101-1, 101-2, and 101-3, a  
09:53:59AM 20 judicial admission that GEO can and does pay more than a  
09:54:02AM 21 dollar at other facilities that it operates with contracts  
09:54:05AM 22 with ICE. We've got examples of the invoices that GEO  
09:54:09AM 23 sends to ICE documenting the reimbursement rate that ICE  
09:54:14AM 24 will pay for, and the GEO billable rate that GEO pays when  
09:54:18AM 25 it needs to have a higher rate in order to get detainees

09:54:21AM 1 to do the jobs so that it can function. And we've got an  
09:54:24AM 2 example of a page from a GEO detainee manual at another  
09:54:28AM 3 one of its facilities.

09:54:29AM 4 The reason we filed those things is because the  
09:54:31AM 5 statements that have been made in briefing about a uniform  
09:54:34AM 6 national policy of only paying detainees \$1 a day are not  
09:54:38AM 7 factually accurate. Those statements are not true. There  
09:54:40AM 8 are dozens of facilities in this country, including at  
09:54:43AM 9 least three that I know of that are run by GEO, in which  
09:54:46AM 10 the contractor pays more, and the government approves it.

09:54:49AM 11 And that's as it should be. Because according to the  
09:54:52AM 12 declaration submitted by ICE today, this morning, that was  
09:54:55AM 13 received by GEO last night at 4:45 -- 4:42, GEO is  
09:55:00AM 14 responsible for designing and implementing the  
09:55:04AM 15 performance-based requirements, including the  
09:55:08AM 16 work program. That is in the contract language, at  
09:55:11AM 17 Page 82, that my friend pointed out to the court.

09:55:15AM 18 Throughout this declaration Mr. Johnson makes clear  
09:55:19AM 19 that the contractor is required for coming up with the  
09:55:25AM 20 work plan and determining how it is going to be run.

09:55:29AM 21 I can point the court to the paragraphs. I have only  
09:55:32AM 22 had a little bit of time to review it. It says  
09:55:35AM 23 explicitly, "Performance-based contracts do not designate  
09:55:38AM 24 how a contractor is to perform the work, but rather  
09:55:42AM 25 establishes the expected outcomes and results that the

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09:55:45AM 1 government expects." That's Paragraph 8.

09:55:48AM 2 Throughout this declaration, at Paragraph 9, at  
09:55:52AM 3 Paragraph 12, and Paragraph 13, the language is that of  
09:55:59AM 4 reimbursement. The answer to the question, "Why does it  
09:56:09AM 5 say a dollar as the reimbursement rate," is because it is  
09:56:13AM 6 the reimbursement rate.

09:56:17AM 7 The defendant does not address the key other  
09:56:19AM 8 provisions in the contract which require GEO to ascertain  
09:56:23AM 9 on a rolling basis what its legal requirements are, its  
09:56:29AM 10 state/local legal requirements, and comply with the most  
09:56:33AM 11 stringent standard.

09:56:34AM 12 In that respect, GEO is much more like the contractor  
09:56:38AM 13 in Campbell-Ewald versus Gomez, where the federal  
09:56:42AM 14 government said you have to make sure that you comply with  
09:56:46AM 15 the notification requirements before you attack somebody.  
09:56:48AM 16 It's like the contractor in Cunningham.

09:56:50AM 17 I think Salim is instructive here. In Salim the  
09:56:55AM 18 Eastern District of Washington reviewed claims of  
09:56:57AM 19 derivative sovereign immunity by contractors. It was key  
09:57:01AM 20 that those contractors had a discretionary role in  
09:57:04AM 21 formulating the way that the program worked. That  
09:57:07AM 22 destroyed Yearsley prong 1, which was the authorization.  
09:57:10AM 23 That discretion, that contractual delegation of authority  
09:57:13AM 24 to determine how it works, which we see in this  
09:57:17AM 25 declaration from ICE, the first time we have seen it, the

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09:57:20AM 1 first time the court has seen it, that's the way GEO  
09:57:24AM 2 operates at the Northwest Detention Center.

09:57:26AM 3 And it begs the question, if GEO can pay two or three  
09:57:30AM 4 bucks at the south Texas facility, and the LaSalle  
09:57:33AM 5 detention facility, why can't it pay 11 here?

09:57:37AM 6 There is no legal impediment from Congress. That is  
09:57:41AM 7 black letter appropriations law. We cited it at Page 13  
09:57:45AM 8 of our response. And appropriators will tell you that the  
09:57:49AM 9 law is, an appropriations bill is valid for the period of  
09:57:54AM 10 the appropriation.

09:57:55AM 11 Now, there is an authorization for payment of  
09:57:57AM 12 detainees out of the lump sum allocation of money to DHS  
09:58:03AM 13 every year. That is an authorization, okay -- it's the  
09:58:05AM 14 authority that Congress has given ICE to pay.

09:58:08AM 15 But the appropriation is two parts. The  
09:58:12AM 16 appropriation does not specify a wage rate, and it has not  
09:58:17AM 17 since 1978. I think the court grasped that in its prior  
09:58:21AM 18 rulings.

09:58:21AM 19 In 1939 the Supreme Court said that the government  
09:58:24AM 20 does not become a conduit of its immunity in suits against  
09:58:29AM 21 its agents and instrumentalities merely because they do  
09:58:32AM 22 its work. That is the proposition that is before this  
09:58:37AM 23 court on GEO's motion to dismiss on Yearsley immunity.  
09:58:41AM 24 GEO is saying, "Because we have a contract with the  
09:58:43AM 25 government, ipso facto, they blessed everything we are

09:58:46AM 1 doing, they have authorized everything we are doing, and  
09:58:48AM 2 that's enough. We are immune." That is simply not the  
09:58:51AM 3 law.

09:58:52AM 4       OIG Document 18-67 was released June 26th, 2017.  
09:58:58AM 5 That is the Department of Homeland Security's Office of  
09:59:02AM 6 Inspector General. It is titled, "ICE's inspections and  
09:59:06AM 7 monitoring of detention facilities do not lead to  
09:59:09AM 8 sustained compliance or systemic improvements." The fact  
09:59:13AM 9 that the contract -- the fact that GEO continues to  
09:59:16AM 10 operate the facility does not equal ICE's authorization of  
09:59:20AM 11 everything it does there.

09:59:22AM 12       So we think that GEO's motion fails at prong 1. And  
09:59:27AM 13 we have discussed why at prong 2, ICE does not have the  
09:59:31AM 14 authority to set a rate. And you will look in vain for  
09:59:34AM 15 something in this declaration or the prior one that was  
09:59:37AM 16 filed by Ms. Valerio -- We found out last night she's  
09:59:42AM 17 actually serving as a paid consultant for GEO, and  
09:59:45AM 18 submitted the declaration in violation, apparently, of the  
09:59:48AM 19 agency's Touhy regulations, and I fear in violation of 41  
09:59:52AM 20 U.S.C. 2104(a)(3). You will look in vain for something  
09:59:56AM 21 that says, "Here is the delegation from Congress that says  
09:59:59AM 22 \$1 a day this year." The last time that happened was in  
10:00:02AM 23 1978.

10:00:03AM 24       This is an improper forum. This motion to dismiss is  
10:00:07AM 25 an improper forum to resolve these issues. These are fact

10:00:11AM 1 questions. I would love to depose Mr. Johnson. I would  
10:00:14AM 2 love to depose Ms. Valerio. We have not had an  
10:00:18AM 3 opportunity to do that yet. Ms. Valerio was subpoenaed,  
10:00:21AM 4 and her testimony was replaced by some other ICE  
10:00:26AM 5 officials. It was scheduled for Washington, D.C. We  
10:00:28AM 6 later found out that the government was going to move to  
10:00:30AM 7 quash those subpoenas. GEO issued them, and ICE was going  
10:00:33AM 8 to move to quash them. We have not had an opportunity to  
10:00:36AM 9 test these propositions through documented fact discovery.  
10:00:40AM 10 And we should.

10:00:40AM 11 If you look at the cases on which GEO relies, they  
10:00:44AM 12 are resolved on summary judgment, not a motion to dismiss  
10:00:48AM 13 pre-depositions, pre-paper discovery.

10:00:50AM 14 An instructive case that we discovered after reading  
10:00:53AM 15 GEO's reply is Anchorage versus Integrated Concepts and  
10:00:58AM 16 Research, Inc. That is Judge Gleason in the District of  
10:01:02AM 17 Alaska.

10:01:02AM 18 THE COURT: I'm sorry, Judge who?

10:01:07AM 19 MR. FREE: Judge Gleason. 1 F. Supp. 3d 1001.  
10:01:12AM 20 And we point the court to Page 1012, particularly to Note  
10:01:17AM 21 77.

10:01:18AM 22 Because this case is about derivative sovereign  
10:01:22AM 23 immunity, we think that the court should at least consider  
10:01:26AM 24 what courts have said about the nature of this defense, is  
10:01:30AM 25 it a jurisdictional defense, like actual sovereign

10:01:33AM 1 immunity, the immunity of the sovereign, or is it a merits  
10:01:37AM 2 defense? Is it a defense to liability? At Note 77 of  
10:01:42AM 3 this decision Judge Gleason analyzes that, and concludes  
10:01:44AM 4 it is the latter, it is a defense to liability, regardless  
10:01:47AM 5 of the nomenclature courts have used.

10:01:50AM 6 Judge Walton in the District of Columbia, In Re Fort  
10:01:54AM 7 Totten, 895 F.Supp. 2d 48 at Page 78, also discusses how  
10:02:00AM 8 this is not actually a jurisdictional defense; it is  
10:02:04AM 9 actually a liability defense.

10:02:05AM 10 And if you read Justice Ginsburg's opinion in  
10:02:08AM 11 Campbell-Ewald, the manner in which she disposes of the  
10:02:12AM 12 question, which is to take all inferences in a light most  
10:02:16AM 13 favored to the plaintiff, and avoid summary disposition,  
10:02:19AM 14 that is a summary judgment standard. She cites  
10:02:26AM 15 Matsushiba, I believe.

10:02:27AM 16 Again, that would not be the case if it were  
10:02:29AM 17 jurisdictional. The plaintiff would have the burden of  
10:02:32AM 18 proving jurisdiction, as it does in a 12(b)(1) factual  
10:02:35AM 19 attack. So we do not believe this is the proper forum to  
10:02:38AM 20 resolve these questions.

10:02:39AM 21 And with that, your Honor, unless you have any  
10:02:42AM 22 specific questions about Yearsley, I am going to hand it  
10:02:44AM 23 over to Mr. Whitehead to discuss the class certification.

10:02:47AM 24 THE COURT: I might ask you, and the defense may  
10:02:56AM 25 wish to respond to this -- if I can find my note. I

10:03:19AM 1 wondered about this in regard to the elements to prove  
10:03:24AM 2 Yearsley immunity. The first thing is that the government  
10:03:30AM 3 authorized the contractor's actions. Does that mean in  
10:03:38AM 4 this setting that the government has to, for Yearsley to  
10:03:44AM 5 apply, authorize a dollar a day, or does it mean the  
10:03:51AM 6 government has to authorize the contractor to ignore the  
10:04:00AM 7 state law?

10:04:01AM 8 MR. FREE: I think it is the latter, your Honor.  
10:04:03AM 9 We would point the court to Meyers versus the United  
10:04:06AM 10 States. That is a Ninth Circuit case from 1963. The cite  
10:04:09AM 11 there is 323 F.2d 580, and it is at Page 583. The Ninth  
10:04:18AM 12 Circuit looked at this authority prong and interpreted it  
10:04:21AM 13 as, "in conformity with the terms of said contract."

10:04:26AM 14 So, in other words, it said the contractor is immune  
10:04:29AM 15 so long as it is in conformity with the terms of the  
10:04:32AM 16 contract. And once you fall out of conformity, you have  
10:04:37AM 17 exceeded the authorization of the government to pay.

10:04:41AM 18 What we would contend in this case is that GEO is out  
10:04:44AM 19 of conformity with the term of the contract that requires  
10:04:46AM 20 it to continuously ascertain all applicable state and  
10:04:50AM 21 local laws; and that by not applying the most stringent  
10:04:54AM 22 law in the event of a conflict, specifically by not paying  
10:04:58AM 23 minimum wage, it is acting outside the federal  
10:05:00AM 24 government's authorization.

10:05:01AM 25 The court will look in vain for any paragraph in the

10:05:06AM 1 Johnson declaration filed this morning saying that ICE has  
10:05:11AM 2 authorized GEO to violate Washington's Minimum Wage Act.  
10:05:17AM 3 It is not there.

10:05:18AM 4 If the court has no further questions, we will  
10:05:21AM 5 address the class cert.

10:05:35AM 6 MR. WHITEHEAD: Good morning, your Honor. GEO  
10:05:47AM 7 relies upon civil immigration detainees participating in  
10:05:53AM 8 the Voluntary Work Program to operate the Northwest  
10:05:58AM 9 Detention Center on the Tideflats.

10:06:00AM 10 As the court knows, these VWP workers are only  
10:06:04AM 11 compensated at the rate of \$1 a day. Looking at the  
10:06:07AM 12 economic realities of the situation, we argue that an  
10:06:10AM 13 employment relationship exists between GEO and the  
10:06:13AM 14 detainee workers at the Northwest Detention Center, and,  
10:06:18AM 15 further, that GEO violates the Washington Minimum Wage Act  
10:06:22AM 16 by paying these workers sub-minimum wages.

10:06:26AM 17 GEO obviously disagrees with our position. But when  
10:06:30AM 18 you look at the overarching questions in this case, they  
10:06:35AM 19 are common and predominate over any individualized  
10:06:38AM 20 questions. That being the case, the class vehicle is the  
10:06:42AM 21 best way, the superior means, by which to resolve the  
10:06:46AM 22 rights of hundreds of people, if not more, in one fell  
10:06:51AM 23 swoop. So for that reason, we look to certify a class.

10:06:54AM 24 Rather than hustling through every element of  
10:06:57AM 25 Rule 23(a) or 23(b)(3), I would like to quickly, in the

10:07:04AM 1 limited time that I have, address the remaining points,  
10:07:07AM 2 the first of which is that GEO practically admits that  
10:07:10AM 3 common questions abound and predominate.

10:07:13AM 4 We have heard in its first motion to dismiss, in the  
10:07:16AM 5 context of the class certification motions, that there is  
10:07:20AM 6 a threshold question, the question of whether or not work  
10:07:24AM 7 authorization somehow precludes class certification if  
10:07:29AM 8 there is a preemption issue. This is a rehash of GEO's  
10:07:35AM 9 first motion to dismiss. In other words, they are arguing  
10:07:37AM 10 the threshold question is, could an employment  
10:07:40AM 11 relationship exist between the parties?

10:07:42AM 12 The court has already answered this question in the  
10:07:44AM 13 context of the motion to dismiss, denying that motion.  
10:07:47AM 14 And since then, the Central District of California has  
10:07:51AM 15 revisited the issue and analyzed and found there is no  
10:07:54AM 16 IRCA preemption.

10:07:55AM 17 Setting aside the fact that GEO is wrong on the law,  
10:07:58AM 18 in the context of class certification, it simply does not  
10:08:02AM 19 matter in the sense that there is an overarching question  
10:08:05AM 20 that is common to the class that is capable of a common  
10:08:08AM 21 answer. In that way the threshold question they have  
10:08:11AM 22 identified supports and undergirds our contention that  
10:08:14AM 23 there is a common overarching question that is capable of  
10:08:18AM 24 a common answer in this case.

10:08:19AM 25 Not only that, once you get past what they have

10:08:22AM 1 identified as the threshold question of, could an  
10:08:25AM 2 employment relationship exist, you then delve into whether  
10:08:28AM 3 or not an employment relationship did in fact exist.

10:08:31AM 4 The Washington State Supreme Court has devised an  
10:08:35AM 5 economic reality test, which is a multifactorial test that  
10:08:39AM 6 looks at the nature of the relationship between the  
10:08:41AM 7 parties. So when you are looking at the nature of the  
10:08:43AM 8 relationship, you are asking yourself questions, for  
10:08:45AM 9 example, who, when, where, what, and why of GEO's  
10:08:50AM 10 authority. Who could participate in the volunteer work  
10:08:52AM 11 program? Could they direct where and when they worked?  
10:08:55AM 12 Did they control the means of the production? In this  
10:08:58AM 13 instance, did they give them training? Did they give them  
10:09:01AM 14 equipment? Did they set the pay rate of a dollar a day?  
10:09:04AM 15 Does GEO rely upon the labor of the detainee workers to  
10:09:09AM 16 support its operations? These are overarching questions  
10:09:11AM 17 that are capable of a common answer.

10:09:13AM 18 Now, GEO will point to the granular aspects of the  
10:09:17AM 19 daily tasks. They will say, "Well, the work that was  
10:09:20AM 20 performed by the person that cleaned the kitchen is  
10:09:22AM 21 different than the work that was performed by the person  
10:09:24AM 22 that cleaned the bathroom."

10:09:25AM 23 They will point to security assessments: "Well, this  
10:09:28AM 24 person is high risk, and therefore they are confined to  
10:09:30AM 25 their pod," versus, "This person is deemed as a lower

10:09:34AM 1 security risk and has more free-ranging ability throughout  
10:09:37AM 2 the facility."

10:09:38AM 3 At the end of the day, those are questions that do  
10:09:40AM 4 not impact the scope of GEO's authority or the scope of  
10:09:46AM 5 the economic relationship between the parties.

10:09:48AM 6 I mean, the relationship, however broad, however  
10:09:51AM 7 narrow, would be the same, irrespective of the tasks that  
10:09:55AM 8 are being performed on a daily basis.

10:09:58AM 9 The second point that I want to look at is the fact  
10:10:01AM 10 that individual questions about damages do not predominate  
10:10:07AM 11 over the common questions regarding liability. The cases  
10:10:12AM 12 are legion. We cite them in our brief. Courts find in a  
10:10:17AM 13 wage-and-hour context when there is a common scheme, and  
10:10:21AM 14 the fact that there is a common question capable of a  
10:10:24AM 15 common answer, the fact that there are individualized  
10:10:27AM 16 damage inquiries does not somehow defeat class  
10:10:30AM 17 certification. That is almost always going to be the case  
10:10:32AM 18 in a wage-and-hour case, in that there are going to be  
10:10:35AM 19 different damages apportioned to different class members.

10:10:37AM 20 The thing about a wage-and-hour case, of course, as  
10:10:39AM 21 the court well knows, those damages lend themselves to  
10:10:43AM 22 formulaic calculations. I mean, it is simply a matter of  
10:10:46AM 23 math in terms of figuring out what those damages are. So  
10:10:49AM 24 it does not necessarily defeat the overarching common  
10:10:52AM 25 question with respect to liability.

10:10:55AM 1 Not only that, as we point out in our briefing,  
10:10:59AM 2 representative data may be used, sampling may be used to  
10:11:03AM 3 help in the quest to calculate the actual damages.

10:11:06AM 4 The Supreme Court has endorsed this approach. In  
10:11:09AM 5 looking at Tyson Food v. Bouaphakeo, there is the notion  
10:11:13AM 6 that we can look to aggregate damages, meaning GEO's total  
10:11:18AM 7 liability, as a matter of math in figuring out what the  
10:11:21AM 8 total liability would be and then figuring out the  
10:11:23AM 9 proportionate share of damages for individual class  
10:11:26AM 10 members.

10:11:26AM 11 The last point that I would like to address is the  
10:11:28AM 12 adequacy of the plaintiff, Fernando Aguirre-Urbina. There  
10:11:36AM 13 has been a late -- I think it was titled as a supplemental  
10:11:39AM 14 authority, that was submitted to the court, regarding his  
10:11:42AM 15 medical records, and arguing from those records that he is  
10:11:45AM 16 somehow an inadequate class representative.

10:11:48AM 17 I think, first and foremost, GEO has waived these  
10:11:51AM 18 sort of arguments in that way, in that they did not  
10:11:53AM 19 address it in their motion to deny class certification,  
10:11:57AM 20 and did not address it squarely in their opposition to our  
10:11:59AM 21 motion to certify. So I think waiver has occurred in that  
10:12:02AM 22 way.

10:12:02AM 23 Even if the court were to consider their arguments,  
10:12:04AM 24 what was true in the past of Mr. Aguirre-Urbina is  
10:12:07AM 25 certainly not true today. We submitted in somewhat of,

perhaps, an unusual step of giving the court the entire transcript, as well as the video, so that you could see for yourself that he withstood seven hours of very pointed questions, at times very disdainful questioning, and performed admirably. The question of adequacy is one as to whether or not there is a conflict between the proposed class rep and the class, and whether or not that person will help in the prosecution of the case.

Mr. Aguirre-Urbina has done that ably in this matter.

Even to the extent -- assuming the court were to find somehow that he was inadequate as a class representative, well, he is one of two proposed class representatives. So that issue alone would not preclude class certification in this case.

In conclusion, what we are dealing with here, and you see this in the performance-based national detention standards, the contracts, and, frankly, from the argument this morning, that we are dealing with a common scheme. We are dealing with a common program as it relates to the VWP workers which GEO administers.

In that way, the class vehicle is well suited to resolve the rights of these folks. So in that way, we urge the court to certify a class. It would not be the first court to do so, in the sense that in the District of Colorado there was a class certified of detainee workers

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10:13:33AM 1 which was recently upheld by the Tenth Circuit.

10:13:37AM 2 Unless there are any further questions from the  
10:13:38AM 3 court, I would conclude my remarks.

10:13:41AM 4 THE COURT: I may have some. Let's go ahead.  
10:13:48AM 5 Defense counsel reserved some time. Excuse me. Did you  
10:14:04AM 6 get the citations that counsel referred to as we went  
10:14:09AM 7 along? Nathan Nanfelt is one of my law clerks. He is the  
10:14:16AM 8 brains of the operation here. I sometimes wonder if  
10:14:20AM 9 lawyers realize how much they are arguing to law clerks as  
10:14:25AM 10 well as the judge. Anyway, go ahead.

10:14:29AM 11 MR. EMERY: Your Honor, there is a daunting  
10:14:32AM 12 number of things to respond to here, but I think the first  
10:14:34AM 13 thing -- just one thing to revisit on Yearsley immunity  
10:14:39AM 14 is, again, to emphasize ICE pays the same amount at every  
10:14:45AM 15 facility. There is no reason to treat us different as a  
10:14:48AM 16 contractor. ICE funds the Voluntary Work Program because  
10:14:54AM 17 it is its program. It is a national program. If you read  
10:14:57AM 18 the declaration filed today, there is an emphasis  
10:15:00AM 19 throughout that they want uniformity.

10:15:03AM 20 All of the paper that is put in this case -- They  
10:15:06AM 21 come in and produce some, you know, blips here and there,  
10:15:12AM 22 something from other cases. Let's talk about this case.  
10:15:14AM 23 They have alleged we pay \$1 a day. That's what ICE tells  
10:15:18AM 24 us to do. That's what we are authorized to do.

10:15:20AM 25 The second thing is to turn to the issue of

10:15:24AM 1 employment. This is an important moment, because if the  
10:15:28AM 2 court allows these claims to go forward, and even  
10:15:32AM 3 considers them for class certification, it is turning its  
10:15:37AM 4 back on a considerable amount of agency experience and  
10:15:42AM 5 history. ICE has been operating detention facilities  
10:15:46AM 6 through contractors for decades. No state agency --  
10:15:50AM 7 nobody has ever come forward to GEO and suggested that it  
10:15:53AM 8 should be paying state-level minimum wages when Congress  
10:15:57AM 9 has expressly said what the rate is for payment, and ICE  
10:16:01AM 10 controls the money that goes to detainees.

10:16:05AM 11 I would point you in particular to the FLSA opinions,  
10:16:09AM 12 that have gone back for decades, that draw a very simple  
10:16:13AM 13 distinction: Are detainees entitled to minimum wage under  
10:16:19AM 14 the FLSA? No. Why? Because they are not employees.  
10:16:22AM 15 They work for purposes of institutional maintenance. They  
10:16:25AM 16 are not out seeking a wage to help support themselves.

10:16:27AM 17 When the detainees are in a facility they are  
10:16:30AM 18 supported, they have clothing, they have healthcare, they  
10:16:33AM 19 have food. They are not the particular wage earner, and  
10:16:36AM 20 they are not the recipient of the largess of state minimum  
10:16:39AM 21 wage laws.

10:16:40AM 22 There is nothing in our contract that suggests that  
10:16:43AM 23 ICE ever intended us to subject -- to have our detention  
10:16:48AM 24 facilities and the VWPs run by the various different state  
10:16:53AM 25 laws where ICE has facilities.

10:16:55AM 1 This is the same rationale that the --

10:16:57AM 2 THE COURT: If that's the case, why is that  
10:16:59AM 3 provision in the contract regarding state and local laws?

10:17:07AM 4 MR. EMERY: Because there are a number of state  
10:17:09AM 5 laws that we are required to -- For example, there are  
10:17:13AM 6 different federal laws. The VWP complies with OSHA, with  
10:17:18AM 7 state labor laws. That has been expressed. There is  
10:17:21AM 8 definitely room for that. It doesn't mean that no state  
10:17:24AM 9 laws are relevant.

10:17:26AM 10 But on an issue on which Congress has expressly  
10:17:29AM 11 spoken, expressly set a rate, now and hereafter there is  
10:17:34AM 12 no -- there is simply no plausible understanding that ICE  
10:17:37AM 13 intended for state minimum wage laws everywhere it has  
10:17:41AM 14 facilities to set what that rate is.

10:17:44AM 15 I mean, if ICE had intended state minimum wages,  
10:17:49AM 16 which are at least 11, \$12 an hour, how does that make  
10:17:53AM 17 sense with the at least \$1 per day provision? Why would  
10:17:57AM 18 ICE have that provision, use that language, if it intended  
10:18:00AM 19 the state minimum wage laws would work at any given state?

10:18:07AM 20 There has been talk in the briefing and today about  
10:18:12AM 21 the economic reality test. Your Honor, there is only one  
10:18:15AM 22 economic reality that matters here. If Mr. Nwauzor,  
10:18:19AM 23 Mr. Aguirre, Mr. Chen, and likely just about anybody in  
10:18:24AM 24 their class, had come to GEO while they were detained and  
10:18:28AM 25 asked to become a GEO employee, they would have said, "No

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10:18:30AM 1 chance to do so." Why? Because they were forbidden by  
10:18:35AM 2 federal law from doing so by their detention status. They  
10:18:37AM 3 either had criminal convictions, which would have  
10:18:40AM 4 prohibited --

10:18:40AM 5 THE COURT: What if GEO is in fact, under an  
10:18:43AM 6 economic reality test, employing these people? The law is  
10:18:50AM 7 against the employer from employing people that are not  
10:18:53AM 8 employable. It doesn't prevent any illegal immigrant from  
10:19:00AM 9 working.

10:19:01AM 10 MR. EMERY: I understand your Honor's position on  
10:19:03AM 11 that. What really is the reality --

10:19:05AM 12 THE COURT: It is not my position. It is a  
10:19:07AM 13 question.

10:19:07AM 14 MR. EMERY: Okay. I understand the question.  
10:19:09AM 15 What is the reality of saying that we treated them like  
10:19:12AM 16 employees? We absolutely did not treat them as employees.

10:19:16AM 17 Do you know what our employees need to do to pass a  
10:19:19AM 18 background check? Do you know the expectations of them to  
10:19:22AM 19 be able to -- Our employees, we can tell them what to do,  
10:19:25AM 20 when to show up for work, what to do.

10:19:28AM 21 Think of the typical detainee. ICE tells them when  
10:19:31AM 22 to come to the facility, ICE says when they leave, ICE  
10:19:35AM 23 says what classification level they can work at, which  
10:19:37AM 24 drastically restricts the jobs they work. ICE even  
10:19:41AM 25 decides on a shift-by-shift basis who can actually work in

10:19:44AM 1 the program.

10:19:45AM 2 This is going back to Page 82 of the contract, where  
10:19:49AM 3 we were before. I would direct you to the very bottom  
10:19:53AM 4 paragraph on this page. It says, "It will be the sole  
10:19:58AM 5 responsibility of ICE to determine whether a detainee will  
10:20:03AM 6 be allowed to perform on voluntary work details and at  
10:20:06AM 7 what classification level." "The sole responsibility of  
10:20:11AM 8 ICE."

10:20:15AM 9 Mr. Kimble's declaration explains how this process  
10:20:18AM 10 works. There are kites that are put out, GEO puts  
10:20:21AM 11 together a list which is approved by ICE. ICE can take  
10:20:24AM 12 any single person off this list they want. How on earth  
10:20:28AM 13 is it the economic reality that GEO is the employer of any  
10:20:31AM 14 of these detainees? They are in federal immigration  
10:20:37AM 15 detention. They are in the federal government's custody.  
10:20:39AM 16 The federal government says what is done to them.

10:20:42AM 17 The very last thing, quickly, is class certification.  
10:20:45AM 18 Your Honor, the main thing I want to say here is we know  
10:20:47AM 19 so little about these claims. We know so little about  
10:20:50AM 20 them. You saw them rattle off, "Oh, we are going to do a  
10:20:53AM 21 model of this, we are going to do a model of that." The  
10:20:56AM 22 first gauntlet that any class member would have to do is  
10:20:59AM 23 to show that they are authorized to work for us when they  
10:21:02AM 24 are at --

10:21:02AM 25 THE COURT: Wait a minute. Wait a minute. Why

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10:21:05AM 1 do they have to show that they are authorized to work when  
10:21:08AM 2 in fact they are working?

10:21:12AM 3 MR. EMERY: They are not. They are voluntarily  
10:21:15AM 4 participating in the Voluntary Work Program. GEO knows  
10:21:19AM 5 who works for them, because they pass all of our  
10:21:21AM 6 employment verification tests. None of these detainees  
10:21:25AM 7 did. They performed work as the government said that they  
10:21:27AM 8 could volunteer to do for a pay rate the government said  
10:21:31AM 9 they could do.

10:21:32AM 10 If there is going to be a class, it is going to have  
10:21:35AM 11 to be a class of people who actually were authorized to be  
10:21:38AM 12 our employees. None of these folks were. None of the  
10:21:40AM 13 named plaintiffs so far have met that. And they haven't  
10:21:45AM 14 pointed to a single class member --

10:21:57AM 15 THE COURT: There are examples all over the  
10:21:59AM 16 country of illegal immigrants who get work. And because  
10:22:10AM 17 they are illegal, their employers pay them less than  
10:22:15AM 18 minimum wage, because they think they can't complain.  
10:22:22AM 19 There are instances where -- we see cases where people in  
10:22:31AM 20 fact come into the country and are effectively enslaved  
10:22:37AM 21 and required to work without pay. The Minimum Wage Act is  
10:22:44AM 22 designed to protect the workers from being abused by  
10:22:52AM 23 employers. Employers are the ones that are restricted  
10:22:59AM 24 from hiring people that aren't qualified to work in the  
10:23:03AM 25 country. But the workers are not so limited.

1 I guess what I'm leading up to is this: Isn't this  
2 all a jury question? You guys asked for a jury, to my  
3 great relief. Isn't it a jury question as to what the  
4 employment relationship, if any, was, and how these  
5 various contract provisions and legal provisions should be  
6 applied?

7 MR. EMERY: It absolutely is not. Your Honor, I  
8 appreciate the concern. I recognize that that is the  
9 objective of a lot of state minimum wage laws. The folks  
10 in the unfortunate position you are talking about are not  
11 supported with food, and clothing, and healthcare, and  
12 medical care at U.S. taxpayer expense.

13 THE COURT: Some of them get various benefits  
14 from their employers.

15 MR. EMERY: They may. The Salas case is actually  
16 quite a good case on this point, your Honor. Salas says  
17 you may have to pay back -- an employer might have to pay  
18 backpay if they sort of willfully ignore the detention  
19 status of the detainee and employ them. Once it is  
20 determined that they are unlawfully working, there is no  
21 more obligation to pay backpay.

22 We know from the day they step into our facility they  
23 are not employees. There is no work authorization, and  
24 therefore no state minimum wage laws are going to apply.

25 We are in a different universe here. The detainees

10:24:49AM 1 aren't here because they are being exploited. The  
10:24:51AM 2 detainees are here because they are in the federal  
10:24:54AM 3 government's custody. If that's what the root issue is,  
10:24:57AM 4 there is a complaint about their custody itself, and the  
10:25:00AM 5 fact that they are in a federal detention facility, this  
10:25:03AM 6 is entirely the wrong case. That's an action that should  
10:25:06AM 7 be brought directly against the U.S. government, and not  
10:25:08AM 8 its federal contractor. It is another reason why Yearsley  
10:25:16AM 9 applies to us.

10:25:17AM 10 THE COURT: Thank you. Let me see if I have any  
10:25:19AM 11 other questions I want to put to you. I had a list of  
10:25:24AM 12 things.

10:25:32AM 13 MR. EMERY: Should I sit down or stay up?

10:25:35AM 14 THE COURT: Suit yourself, as long as you speak  
10:25:39AM 15 into the mic when you talk to me. I guess the only  
10:26:38AM 16 question I have is the process for authoring policies  
10:26:53AM 17 listed in the detainee handbook. Can somebody fill me in  
10:27:05AM 18 on that, what the process is?

10:27:08AM 19 MS. MELL: Your Honor, the position of GEO is  
10:27:11AM 20 that the oversight on the PBNDS standards by Congress  
10:27:18AM 21 requiring routine updates as to its implementation of  
10:27:24AM 22 PBNDS standards have set a Congressional level of  
10:27:28AM 23 authority to enforce those regulations.

10:27:31AM 24 THE COURT: I think you misunderstand my  
10:27:34AM 25 question. I am talking about the process for preparing

10:27:40AM 1 the detainee handbook and the policies that are in the  
10:27:46AM 2 handbook.

10:27:46AM 3 MS. MELL: From GEO's perspective?

10:27:49AM 4 THE COURT: No. No. Not from somebody's  
10:27:52AM 5 perspective. What is the process?

10:27:54AM 6 MS. MELL: I am asking whether you are inquiring  
10:27:56AM 7 of the PBNDS standards or GEO's standards?

10:28:01AM 8 THE COURT: You see, let me explain what I am  
10:28:05AM 9 talking about. We have all this reference to not less  
10:28:10AM 10 than a dollar a day, and then in the handbook it says \$1 a  
10:28:16AM 11 day. It is not not less than. It says \$1 a day is what  
10:28:19AM 12 they will be paid. My question is, what is the process to  
10:28:25AM 13 get from the standards and the contract over to the policy  
10:28:34AM 14 as stated in the handbook?

10:28:36AM 15 MS. MELL: Your Honor, there are two separate  
10:28:38AM 16 handbooks. I just want to be clear. When the detainee  
10:28:41AM 17 comes into the facility, they get the ICE national  
10:28:45AM 18 detention standard detainee handbook. That says for those  
10:28:49AM 19 detainees who have been participating within the requisite  
10:28:54AM 20 period that we are talking about here shall receive \$1 a  
10:28:57AM 21 day.

10:28:58AM 22 GEO, the detention facility, promulgates a second  
10:29:02AM 23 detainee handbook that mirrors what is in the ICE  
10:29:09AM 24 handbook. They just duplicate it. And then those are  
10:29:13AM 25 both available in dual languages and disseminated to the

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10:29:17AM 1 detainees at the facility.

10:29:19AM 2 So in terms of how it happens, GEO relies on the  
10:29:23AM 3 detainee handbook that is provided by ICE.

10:29:29AM 4 MR. FREE: Paragraph 8 of the ICE declaration  
10:29:31AM 5 filed this morning essentially says, on Page 3 of the  
10:29:43AM 6 declaration, that the performance-based contracts, like  
10:29:48AM 7 the one at Tideflats, don't designate how a contractor  
10:29:52AM 8 performs the work, i.e., from the facility, but rather  
10:29:55AM 9 establishes the expected outcomes and the results.

10:29:58AM 10 The national detainee handbook has never gone through  
10:30:01AM 11 any sort of Congressional oversight. It is not  
10:30:06AM 12 incorporated into the contract. The PBNDS is incorporated  
10:30:11AM 13 into the contract, that says at least \$1 a day. The  
10:30:14AM 14 national detainee handbook, to the extent it says "shall,"  
10:30:17AM 15 is in conflict. But ICE says it's GEO. If you look at  
10:30:21AM 16 the contract, the contractor -- the very first line of the  
10:30:24AM 17 Voluntary Work Program section, the contractor is to  
10:30:31AM 18 develop the work plan.

10:30:33AM 19 MS. MELL: Your Honor, I just want to point out  
10:30:35AM 20 on this specific issue that ICE actually approves the  
10:30:38AM 21 Northwest Detention Center's version of its detainee  
10:30:41AM 22 handbook. It is reflected on the exhibit itself.

10:30:44AM 23 THE COURT: Okay. Thank you. As I indicated, we  
10:30:49AM 24 have already done a lot of work on this. With all these  
10:30:59AM 25 issues raised, as I indicated, it is partly a question of

10:31:04AM 1 what is the law that I should apply now and what are jury  
10:31:15AM 2 questions that come later. That's part of the analysis we  
10:31:21AM 3 have to deal with, I think, in coming to conclusions on  
10:31:24AM 4 these motions.

10:31:27AM 5 I also wanted to say I am aware on the motion to  
10:31:34AM 6 deny -- on the motion to dismiss the amended complaint  
10:31:43AM 7 there are some issues that are revisited from the original  
10:31:46AM 8 motion to dismiss. We have revisited those, even though  
10:31:53AM 9 there is a question raised about whether they are properly  
10:31:57AM 10 before the court. I felt I ought to look at them anew  
10:32:02AM 11 anyway, which we have done. So that will be reflected in  
10:32:08AM 12 the order we will issue.

10:32:10AM 13 Thank you very much. A lot of the same old, same old  
10:32:20AM 14 stuff going on here. We will try and do an appropriate  
10:32:26AM 15 analysis.

10:32:26AM 16 Do you have something further, Ms. Mell?

10:32:28AM 17 MS. MELL: Your Honor, I just was concerned that  
10:32:31AM 18 there was at least some oral presentation by the  
10:32:33AM 19 opposition as to the Tracey Valerio declaration. And it  
10:32:37AM 20 is GEO's position that ICE has not instructed us to  
10:32:39AM 21 withdraw the declaration, that the Touhy issue in play is  
10:32:44AM 22 the application of 5 CFR 2635.805, which says that experts  
10:32:51AM 23 like Tracey Valerio can testify as long as they are not  
10:32:57AM 24 testifying in a case where it is a party. To the extent  
10:33:01AM 25 we need to brief it --

10:33:01AM 1 THE COURT: Ms. Mell, I read her declaration, and  
10:33:08AM 2 saw who she is and where she came from, and the contents  
10:33:12AM 3 of her declaration. I didn't think it made a whole lot of  
10:33:16AM 4 difference in anything. The same thing is true of the  
10:33:23AM 5 later ICE declaration, it just didn't add a lot to the  
10:33:30AM 6 issues I have to decide.

10:33:34AM 7 MS. MELL: Thank you, your Honor.

10:33:35AM 8 THE COURT: What you do about it, whose fault  
10:33:38AM 9 that was, who turned ICE on about that is not my concern.

10:33:47AM 10 MS. MELL: Thank you, your Honor.

10:33:49AM 11 THE COURT: Okay. Thank you.

12 (Proceedings adjourned.)  
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## C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the  
United States District Court, Western District of  
Washington, certify that the foregoing is a true and  
correct transcript from the record of proceedings in the  
above-entitled matter.

/s/ Barry Fanning  
Barry Fanning, Court Reporter